APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED APRIL 12, 2001

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CHICAGO, ILLINOIS 60604

Submitted March 16, 2001*
Decided April 12, 2001.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

No. 00-1787

MARY ANN HETREED,

Plaintiff-Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a); Cir. R. 34(f).

Appendix A

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 96 C 2021.
James B. Zagel, *Judge.*

Order

After our prior opinion in this case, see *Hetreed v. Allstate Insurance Co.*, 135 F.3d 1155 (7th Cir. 1998), the district judge granted summary judgment to Allstate on two of Hetreed's claims: sex discrimination and intentional infliction of emotional distress. Hetreed's claim that her discharge was an act of retaliation for her complaints (the principal subject of the prior appeal) was tried to a jury, which returned a verdict in Allstate's favor. Hetreed appeals from the final decision.

One aspect of the appeal must be dismissed for want of appellate jurisdiction. Hetreed asks us to set aside the district court's award of costs in Allstate's favor. But she did not file a notice of appeal directed to the award of costs, which was made approximately seven months after the decision on the merits. The award of costs therefore is not before us. *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 511-12 (7th Cir. 1989); cf. *Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364, 366-38 (7th Cir. 1993).

A second issue also has not been properly presented. Hetreed contends that the district court should not have barred certain proposed expert witnesses, but her half-page argument (Br. 25) is so cursory that we cannot tell what

experts she believes should have been allowed to testify on what subjects. A litigant who wants appellate review of a subject over which the district court has discretion, and on which appellate review is deferential, see *General Electric Corp. v. Joiner*, 522 U.S. 136 (1997), must do more than simply state her disagreement with the judge's disposition, which is all Hetreed does. Because we have no reason to think that the district judge abused his discretion in the conduct of the trial, the jury's verdict must stand.

Hetreed contends that she suffered sex discrimination because a male supervisor induced her to engage in sexual relations over a four-year period between 1991 and early 1995. (Allstate believes that these relations were consensual and that Hetreed rather than the supervisor was the initiator, but given the posture of the case the district judge properly assumed that Hetreed's version is correct.) The grant of summary judgment was based on *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775 (1998). These cases hold that when a supervisor sexually harasses a subordinate, the employer is not held responsible for the supervisor's acts if the employee did not suffer any "tangible employment action" and the employer demonstrates:

> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765. The district court concluded that Hetreed did not suffer any tangible employment action because she had received all raises and promotions that were her due, and that Allstate exercised reasonable care by putting in place a system for making complaints — a system that Hetreed did not use until half a year after the supervisor in question retired. Moreover, the court observed, when Hetreed did complain, Allstate took the only action available to it: it withheld any discretionary increase in the ex-supervisor's retirement benefits. Hetreed contends on appeal that there were material disputes of fact, but she does not identify any. Her contention that sexual relations are "tangible employment actions" is at variance with the definition given in *Faragher* and *Ellerth*, which used that phrase to refer to wages, promotions, and other acts that may be viewed as the official acts of *the employer* within the scope of Title VII (which deals with wages and other conditions of employment); a supervisor's sexual activity is not attributed to the firm unless it fails to take preventive or responsive steps within its power. Hetreed essentially disagrees with *Ellerth* and *Faragher*. She says, for example, that women should not be required to complain because of the possibility of retaliation. But if that bare possibility were enough, the defense identified in *Ellerth* and *Faragher* would be a dead letter. Retaliation, if it does occur, can be penalized. Hetreed failed to prove that retaliation ensued; an unfounded suspicion that retaliation *might* occur does not deprive an employer of the defense identified by the Supreme Court.

Two remaining arguments require only brief comment.

Hetreed contends that Allstate violated the Americans with Disabilities Act, but her brief does not explain how,

since the firm retained (and promoted) her right up until a discharge that the jury evidently determined was attributable to Hetreed's misconduct. (Our prior opinion describes the circumstances.) Hetreed does not contend that she *was* disabled; to the contrary, she says that she could perform every task. Although, as her brief contends, depression can be disabling, her brief does not relate this to any adverse action taken by Allstate.

Finally, Hetreed's objection to the district court's decision that the workers' compensation laws foreclose her state-law claims against Allstate is unavailing given what happened in the rest of the case. Hetreed wants to apply the label "intentional infliction of emotional distress" to the discrimination and retaliation of which she complains. But given that Allstate prevailed on these claims, it also would prevail even if it were possible to disregard the workers' compensation bar to state-law theories. (Hetreed's assertion that she "has a valid [state-law] claim without the allegations of sexual harassment and retaliation" (Br. 27) is unelaborated, and we do not see how such a claim could survive. See *Smith v. Chicago School Reform Board of Trustees*, 165 F.3d 1142, 1151 (7th Cir. 1999).)

AFFIRMED

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MAY 11, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 96 C 2021
Judge James B. Zagel

MARY ANN HETREED,

Plaintiff,

v.

ALLSTATE INSURANCE CO.,

Defendant.

MEMORANDUM OPINION AND ORDER

This employment dispute is as bitter as they come. Plaintiff Mary Ann Hetreed ("Hetreed") worked at defendant Allstate Insurance Company ("Allstate" or "company") in the internal audit department for nearly ten years, until she was terminated from her position as Audit Manager in May 1997. At the core of the dispute are twelve to sixteen sexual encounters Hetreed had with one of her supervisors, George McGann, from July 1991 to May 1995. According to Hetreed, none of the encounters were consensual or welcomed; according to McGann, the first was consensual but the others he participated in under threat of disclosure. Regardless,

neither of them told anyone at Allstate about the sex, except a junior employee, until September 1995 when Hetreed told Benjamin Tarver, director of Allstate's corporate security department, that she had been harassed. Starting that very day, Tarver conducted a full investigation of Hetreed's allegations, and in March 1996, the company sanctioned McGann for his conduct by not granting him a discretionary post-retirement bonus. Pursuant to the company's early retirement program, McGann had stopped working on May 30, 1995, before Hetreed complained, and stopped drawing a salary on November 30, 1995.

Allstate expressly prohibits sexual harassment, and its Human Resources Policy Guide for Management provides a four-step procedure for handling complaints. Steps 1 and 2 require that the employee report any incident of harassment to the human resources manager, or to line management, who should then inform human resources. Step 3 calls for human resources to conduct an investigation with the assistance of department management, and step 4 calls for the company to take any necessary corrective measures, which could include counseling, reprimand or dismissal. Although not outlined in the manual, Allstate requires that human resources notify the corporate security department of any complaint involving a bonus-level employee (which Hetreed was after 1992). Allstate also had a general employee grievance mechanism called the We Care program in place, although there is conflicting evidence about the program's effectiveness at handling sexual harassment complaints.

At least as early as 1992, Hetreed had a copy of the human resources policy guide. She attended sexual harassment

training in that year as well. From 1992 on, she served as manager in charge of the audit department's administrative functions and spent 90 percent of her time on human resources work. In this capacity, she headed up the 1994 internal audit of the human resources department.

In 1993, Hetreed complained to Dean Bahrman, her immediate supervisor, that a coworker, Dave Williams, was making inappropriate comments to her and that she felt sexually harassed. Hetreed states that she told no one in management about McGann's harassment during the nearly four years in which it occurred, because she thought they already knew about the relationship and because she feared retaliation.

As support for her first belief — that management already knew about the harassment — Hetreed points to a statement by Bahrman to her to: "Keep the big guy happy, no matter what it takes," and to the fact that he once questioned her about McGann's whereabouts when McGann missed a meeting. Bahrman denies having had any knowledge of the relationship, let alone the harassment. Other supervisors — Marge Kellen and Craig Barber — also deny any knowledge of the sexual encounters or the harassment and testified that they noticed nothing unusual about Hetreed and McGann's interaction.

In support for her second belief — that she would suffer retaliation if she told someone about the harassment — Hetreed points to the following incidents. First, in 1991, she asked her then supervisor, Ken Sichz, what the company would do if it discovered that an officer were having

sex with a subordinate. To which, Hetreed says Sichz replied that the company's reaction would depend on the subordinate's rank and that the company would be more likely to interfere in the case of a secretary. Second, Hetreed believes that management retaliated against another employee, Bob Biancalana, who filed a 1992 discrimination complaint with the We Care program, because he left Allstate employ in the next year. Biancalana states that he suffered absolutely no repercussions or retaliation from his use of the program and that the situation was resolved to his satisfaction. Third, when in 1993 Hetreed told Bahrman that Williams sexually harassed her, Bahrman reported the incident to McGann, his supervisor, but did not report it to human resources or to corporate security. McGann spoke to the employee's supervisor, who in turn spoke to Williams directly about the incident, which did not occur again. Fourth, in May 1995, Hetreed asked George Kashmar, the audit department human resources representative, about sexual harassment generally, and he replied that sexual harassment complaints were "nothing but a scam." Finally, in July 1995, Hetreed believes Bahrman criticized her performance unfairly and removed certain of her work responsibilities in retaliation for her challenging his decision to hire a particular employee.

Hetreed filed a complaint with the EEOC on December 29, 1995, alleging sexual harassment by McGann. On April 8, 1996, she filed suit in this court for sexual harassment by McGann, as well as retaliation by Allstate, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, for what she believes was a campaign of retaliation against her that started after her September 1995 internal

complaint. On April 16, 1997, she amended both complaints, expanding her retaliation claim and charging discrimination under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*

Hetreed's retaliation claim asserts that Allstate began taking adverse actions against her soon after she complained about McGann in September 1995, culminating in her termination from the company in May 1997.[1] To support this claim, Hetreed points to the following series of events. First, in the fall of 1995, Dean Bahrman informed her that she would no longer have sole responsibility for running department communications meetings. Second, rumors circulated around the company about her in January 1996, in part because a secretary in the human resources department with access to Hetreed's EEOC complaint told two non-management employees about it, one of whom passed on the information to several others. Third, in early 1996, management created a new director position in the audit department at a level between Bahrman and Hetreed and appointed Dave Williams to fill it, effective August 1996. Fourth, Hetreed's overall merit rating dropped from "Exceeds" to "Meets Expectations" on her November 1996 mid-year performance review. Fifth, Bahrman removed her from leading the 1996 internal human resources audit in December of that year at the request of the human resources department, who became uncomfortable with some of Hetreed's inquiries. Sixth, Allstate refused initially, pursuant to its policy not to compensate employees for time spent on

1. In evaluating the retaliation claim, I exclude all acts that occurred prior to September 1995 when Hetreed reported McGann's conduct to corporate security.

personal lawsuits, to pay Hetreed for time spent at a deposition it had requested in this case. Seventh, the company suspended her in February 1997, with pay, pending an investigation into a possible breach of her ethical duty as an auditor and cut off her phone and computer access during the suspension. Eighth, when issuing her suspension, two managers escorted her out of the building without allowing her time to collect her personal belongings. Finally, the company terminated her in March 1997.

Hetreed's ADA claim charges that Allstate discriminated against her by failing to accommodate changes to her work assignments and environment she requested after developing post-traumatic stress disorder, major depression, and irritable bowel syndrome. Two doctors testified that they diagnosed Hetreed with post-traumatic stress disorder, as a result of the harassment, and major depression, and that they prescribed medication to treat the disorders.

Hetreed told Dean Bahrman about her conditions at her March 1996 performance review. At that time, she told him that she could not perform unstructured tasks, citing the audit department's control self-assessment project that she had been asked to head as an example, and that she had trouble understanding his instructions. In response to these requests, Bahrman took her off the control self-assessment project and told her to tell him anytime she did not understand his instructions. Hetreed also requested that she be able to limit her hours to a normal 40-hour workweek, even though departmental changes meant that after September 1995, she did not work more than five days a week, usually from about 7:30am to 5:00 or 5:30pm. After she told Bahrman about

limiting her hours, he would reassign any work she could not finish. In August 1996, Hetreed told Bahrman that she did not want to work under Dave Williams in light of his past behavior and in January 1997, her doctor requested that she limit her time with him. To smooth Williams's transition and as a matter of course, Bahrman continued to actively supervise Hetreed and another manager through their February 1997 performance appraisals.

On October 11, 1996, Hetreed gave Bahrman an "Allstate FMLA [Family Medical Leave Act] Designation Form" designating October 4 and October 7 as FMLA absences. Attached to the form was a "Certification of Health Care Provider" form signed by Hetreed's psychiatrist, certifying her diagnoses of post-traumatic stress disorder and major depression. In response to questions posed on the form, the doctor indicated that Hetreed was not presently incapacitated, but that it would be necessary for her to work "only intermittently or to work on less than full schedule as a result of the condition." To clarify exactly what Hetreed sought, Bahrman asked her on November 8, 1996 to provide him with more information from her doctor regarding her specific needs. On January 17, 1997, Hetreed gave Bahrman an additional letter from her doctor stating that her contact with her supervisor should be restricted as much as possible. On February 11, 1997, Sammis wrote a letter to Hetreed asking for further clarification. In the letter, Sammis wrote, in relevant part:

> I note that you submitted an FMLA Certification form from your therapist in October, 1996 which indicates that you may require an intermittent

> leave of absence or other reduced work schedule for a period of one year (5.b). More recently, you submitted a letter from your therapist indicating that you are unable to work under your current supervisors, Dean and Dave Williams, because of your need for a work environment with minimal stress. Since the only type of accommodation you have ever discussed with Dean is the job assignment proposal discussed above, it is not clear to us whether you are actually seeking a leave of absence/reduced work schedule, or whether the one-year period recommended by your therapist is intended to refer to the period of time you wished to have your job duties restructured. . . . Alternatively, if what you are requesting is to have your supervisors changed, your only option is to explore other job opportunities outside the Audit Department. Under the current organizational structure of the Audit Department, there is no alternative reporting relationship available to someone at your level.

Hetreed responded to the letter in a memorandum she sent a few days later to Bahrman, in which she stated that due to what "appears to be considerable misunderstanding of both my health situation and the requirements of the Family Medical Leave Act," her attorney would communicate directly with the company.

Allstate moves for summary judgment on each of the three counts. I will grant summary judgment if, drawing all

inferences in the light most favorable to Hetreed, "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). This standard should be applied "with added rigor in employment discrimination cases, where intent and credibility are crucial issues." *Courtney v. Biosound, Inc.*, 42 F.3d 414, 418 (7th Cir. 1994).

Count I: Sexual Harassment

Hetreed's sexual harassment case against Allstate rests on defendant's vicarious liability for the discriminatory acts of one of its supervisors. Assuming for purposes of this motion that McGann's behavior constitutes actionable sexual harassment, Allstate asserts that it cannot be held vicariously liable as a matter of law as it is entitled to the affirmative defense recognized by the Supreme Court in *Burlington Indus., Inc. v. Ellerth*, __ U.S. __, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, __ U.S. __, 118 S. Ct. 2275 (1998). Allstate believes it is entitled to the defense because Hetreed suffered no tangible employment action as a result of the alleged harassment, and both elements of the defense are satisfied, *i.e.* (1) Allstate exercised reasonable care to prevent and correct any sexual harassment, and (2) Hetreed unreasonably failed to take advantage of the preventive and corrective opportunities provided by the company or otherwise to avoid harm. *See Faragher*, 118 S. Ct. at 2292-93; *Ellerth*, 118 S. Ct. at 2270.

Hetreed counters that Allstate is not actually entitled to the affirmative defense, because it is available only in cases

of hostile environment sexual harassment, not to the *quid pro quo* harassment she asserts she suffered. The defense is not limited in that way. In *Ellerth*, the Supreme Court stated that the terms *quid pro quo* and hostile work environment are still helpful when there is a threshold question whether a plaintiff can prove actionable discrimination. *See* 118 S. Ct. at 2265. If discrimination is assumed, however, as it is here, the Court stated explicitly that it is "the factors we discuss below, and not the categories *quid pro quo* and hostile work environment, [that] will be controlling on the issue of vicarious liability." *Id.*

Hetreed next argues that Allstate is not entitled to the affirmative defense because she did, in fact, suffer a tangible employment detriment as a result of the harassment: she had to endure repeated, coerced sexual encounters with her boss in return for "reasonably appropriate future evaluations, compensation (including bonuses and pay raises), responsibilities, and other job-related treatment." Hetreed's argument in essence is that because she submitted to McGann's sexual advances only because of his ability to affect the terms and conditions of her employment, having to endure the harassment itself constituted an employment detriment. But, that is not the balance the Supreme Court struck in *Faragher* and *Ellerth*. Rather, it recognized the effects of the supervisor-subordinate power differential but rejected it as reason to apply automatic liability, *see Ellerth*, 118 S. Ct. 2269, choosing instead to allow employers the affirmative defense in cases where no tangible employment action is taken. Thus, the harassment itself does not constitute tangible employment action; there must be something more.

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A tangible employment action is one that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 118 S. Ct. at 2268. It requires an official act of the enterprise, a company act, and in most cases inflicts direct economic harm. *See id.* at 2269. Hetreed did not suffer any sort of negative repercussions from Allstate or McGann as a result of the harassment; to the contrary, she received promotions and bonuses throughout her time there, and her ultimate termination was unrelated to the harassment itself. Accordingly, Allstate is entitled to assert an affirmative defense to its liability for McGann's harassment.

To prevail at this stage, Allstate must prove each element by a preponderance of the evidence on the material undisputed facts. *See Faragher*, 118 S. Ct. at 2279. On the first element, Allstate points to the preventive and corrective action it took with regard to sexual harassment, in general, and Hetreed's case, in particular. The company had a detailed sexual harassment policy in place at all relevant times, notified its employees of the program, provided managers (including Hetreed) with manuals outlining the policy and with sexual harassment training. It also points to the immediate corrective action it took in Hetreed's case as soon as it had actual notice: it launched an investigation the same day, ensured that McGann and Hetreed had no further contact, and elected not to give McGann a discretionary bonus, one of the only ways it could punish a retired employee.

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Hetreed asserts that there are genuine issues of material fact as to the reasonableness of Allstate's preventive and corrective action. Specifically, while she does not dispute the existence of the policies and the training, she in effect argues that they were ineffective in practice because management didn't follow the procedures when she complained about Williams in 1993. She also asserts that the corrective action taken by the company was ineffective first, in light of the fact that high-ranking officials must have known of the sexual harassment at a much earlier date (and McGann himself definitely did), and second, that Allstate could have punished McGann more severely.

First, I find that Allstate's anti-harassment policies are sufficiently structured, detailed, and publicized to constitute a reasonable preventive measure. While the mere existence of a policy is not enough to establish adequate preventive action, there is no evidence in the record to indicate that this one was ineffective. Hetreed's evidence that Bahrman strayed from the letter of the policy when addressing her complaint about Williams is not enough to create a genuine issue of material fact as to the reasonableness of the preventive measures, when management acted promptly to meet with the subject of the complaint and the behavior ceased thereafter.

Notwithstanding the existence of policies themselves, if management had actual knowledge of the harassment prior to September 1995 and failed to take appropriate action, it would not satisfy the first element of the affirmative defense. Hetreed presents no evidence of actual knowledge of the harassment, however. At best, her evidence (the comments and questioning by Bahrman) builds a circumstantial case

that Bahrman suspected McGann and Hetreed of having a sexual relationship. Knowledge of a sexual relationship between two managers is not the same as actual knowledge of sexual harassment. I also refuse to impute McGann's actual knowledge of his actions to Allstate, as doing so would render the affirmative defense moot.

Finally, when Allstate did gain actual knowledge of the harassment in September 1995, it acted immediately to investigate Hetreed's allegations fully, to insure that McGann and Hetreed had no further contact, and to punish McGann. Thus, the first element of the affirmative defense is satisfied as a matter of law.

To prevail on the second element, Allstate must prove that Hetreed acted unreasonably in not reporting the harassment until she did. The company argues that given the anti-harassment policies in place, Hetreed's actual knowledge of them at least as early as 1992, her familiarity with human resources due to her specific responsibilities within the audit department and the training she received, and her professional access to managers due to her own high rank within the company, it was unreasonable for her to wait more than four years to tell someone about McGann's actions towards her. I agree.

Hetreed counters that a jury could find her decision not to keep quiet reasonable, in light of her evidence that management "must have known" about the sexual relationship and her fear that she would suffer retaliation if she spoke up. If Hetreed did believe that other managers knew about the sexual relationship, it is unreasonable for her to

believe that they definitely knew it was unwanted on her part. Also, in light of her knowledge of the mechanisms in place to handle sexual harassment complaints, it was unreasonable for her to rest on this belief, rather than affirmatively to tell someone. Finally, as a matter of law, her fear of retaliation, even if credited, is not a valid reason for not reporting the harassment, for it prevents the defendant company from taking corrective action. *See Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 492 (S.D.N.Y. 1998) ("generalized fears [of retaliation] can never constitute reasonable grounds for an employee's failure to complain to his or her employer" because doing so would eviscerate affirmative defense). Thus, as Hetreed did not act reasonably in waiting four years to report the harassment, the second element of the affirmative defense is established.

Accordingly, I grant Allstate's motion for summary judgment as to count I.

Count II: Retaliation

In her retaliation claim, Hetreed asserts that Allstate took a series of actions against her after she complained about McGann's conduct, each of which adversely affected her ability to perform her job and which, taken together, constitute evidence of retaliation. Under Title VII, it is unlawful for an employer to discriminate against an employee because she has made a charge under the subchapter. *See* 42 U.S.C. § 2000e-3(a). A plaintiff may prove a violation by presenting direct or indirect evidence of discriminatory intent. *See Oates v. Discovery Zone*, 116 F.3d 1161, 1169-70 (7th Cir. 1997).

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As Hetreed has presented no direct evidence that Allstate acted with discriminatory intent, she must proceed under the burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). Under this well-established formula, to defeat the defendants' motion for summary judgment, Hetreed must establish a *prima facie* case of discrimination by a preponderance of evidence.[2] Specifically, she must show: (1) that she engaged in statutorily protected expression, *i.e.* reporting or otherwise opposing conduct prohibited by Title VII; (2) that she suffered an adverse employment action after or contemporaneous with the protected activity; and (3) that there is a causal link between the two. *See Pafford v. Herman*, 148 F.3d 658, 670 (7th Cir. 1998). If she does this, Allstate must offer "evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." *Oates*, 116 F.3d at 1170 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509, 113 S. Ct. 2742, 2748 (1993)). The burden then shifts back to Hetreed to demonstrate that the company's proffered explanation is merely a pretext for retaliation. *See id.*

Allstate concedes that Hetreed has satisfied the first prong of the *prima facie* case, but argues that she fails on the second, because none of the cited incidents, except the termination, constitutes a negative employment action. Adverse employment actions are defined broadly in this Circuit, *see Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996), but must materially affect the employee's job.

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2. Hetreed argues that each of these incidents are direct evidence of retaliation. They are not, but I am considering them as indirect evidence.

See Rabinovitz v. Pena, 89 F.3d 482, 489 (7th Cir. 1996). While an adverse action is not limited solely to loss or reduction of pay or monetary benefits, *see id.* (citing *Collins v. State of Illinois*, 830 F.2d 692, 703 (7th Cir. 1987)), neither does it include everything that makes an employee unhappy. *See Smart*, 89 F.3d at 441.

With respect to the pre-termination treatment, Hetreed's argument is that Allstate took a series of antagonistic and adverse steps against her that over time materially disadvantaged her. The Williams promotion by itself rises to the level of material adversity, because placing an individual, whom Hetreed had previously accused of sexual harassment and with whom she wanted no contact, in the position of her immediate supervisor arguably would make it much more difficult for her to do her job.[3] Additionally, being removed from the human resources audit and the suspension both adversely affected her employment. The human resources audit incident hurt her, because by putting her in a position in which she had a serious and blatant conflict of interest and then stripping her of that appointment when she made routine inquiries, Allstate damaged Hetreed's professional credibility. Likewise, suspension under suspicion of misappropriation of documents would have damaged the professional reputation of a senior auditor.

By contrast, the remaining actions cited by Hetreed — the spreading of information by non-management employees,

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3. This would not be true in every case, however, and I do not mean to suggest that it is always impermissible for a person to be supervised by an individual against whom he or she once lodged a complaint.

the company's initial refusal to pay her for time spent at her deposition, the November 1996 performance review, and forcing her to leave the office immediately pending her suspension — simply are not adverse actions, even when viewed as part of the whole. First, absent evidence that management instructed the secretaries to leak information about Hetreed's claim or knowingly disregarded an established pattern of such conduct, the disclosures cannot be imputed to the company. Second, as it is undisputed that the company ultimately allowed her to use paid time to attend her deposition in this case, its initial refusal simply does not constitute an adverse action. Third, as the lower performance rating that Hetreed received on her November 1996 mid-year review did not affect her responsibilities or compensation, and especially in light of the high rating she received on her two other post-complaint reviews (her November 1995 mid-year and March 1996 annual review), I find that it did not affect her adversely. *See Rabinovitz*, 89 F.3d at 488-89. Fourth, forcing Hetreed to vacate the premises immediately after issuing her suspension did not adversely affect her ability to perform her job; the suspension itself did that.

For the four adverse actions taken by Allstate — the Williams appointment, removal from the human resources audit, the suspension and the termination — Hetreed still must establish a causal link between her complaint and the company's acts. To satisfy this element, she must demonstrate that Allstate would not have taken the adverse action "but for" the protected expression. *See McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 483 (7th Cir. 1996). A telling temporal sequence, in which the employer's adverse action follows fairly soon after the employee's protected

expression, can establish the required nexus. *See Sweeney v. West*, 149 F.3d 550, 557 (7th Cir. 1998). Hetreed first complained to Tarver in September 1995, filed her EEOC complaint in December 1995, and filed this lawsuit in April 1996. Each of the incidents happened within a year of the filing of the lawsuit, and most within a year after she filed her EEOC complaint. While the causal connection could be more immediate, in light of Hetreed's ongoing complaints about her harassment, I find that the time is not so distant as to preclude a reasonable inference that Allstate's actions were linked to Hetreed's complaint.

The burden thus shifts to Allstate to present legitimate, non-discriminatory reasons for each of its actions, which Hetreed must then demonstrate are pretextual. With regard to the Williams appointment, Allstate asserts that Williams was the only qualified employee available to fill the position. According to Bahrman, the position was created as a developmental one, in order to "bring somebody in from another area that would give that individual an opportunity to see and develop business knowledge about other specific operating areas in the company." As evidence of pretext, Hetreed points to evidence showing that Williams was the only one interviewed for the position and that several other members of the auditing department thought the appointment surprising because Williams had no auditing experience. As it is unusual for a company to place an employee with no auditing experience in a supervisory position over a management-level employee with eight years of auditing experience, and it is undisputed that Bahrman knew about Hetreed's history and present concerns about Williams at the time of the appointment, Hetreed has satisfied her burden in this case.

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Allstate explains its actions with regard to the human resources audit as follows. It trusted that Hetreed would not allow her personal issues to interfere with her work, and that it was only after she breached that duty by making what it considered to be inappropriate inquiries that it transferred her off the audit. Specifically, it considered her request for listings of ledgers on special retirees to be so far outside the scope of the audit as to actually be a terminable offense. Hetreed presents evidence that that was a routine inquiry in such an audit. In light of Allstate's questionable judgment in placing her on the audit in the first place, that is enough to satisfy her burden to show pretext.

Allstate says it suspended Hetreed pending the investigation of her request for information about fees the company paid to the law firm it had hired to defend itself in the instant suit, as well as her decision to give the fee information to her personal attorney. When Hetreed would not provide an immediate explanation — whatever the reason why — the company suspended her, with pay, pending the outcome of the investigation. It is reasonable for a company with reason to doubt the ethics of one of its high-ranking auditors to deny that person access to company files while it investigates. Hetreed has presented no evidence to cast doubt on Allstate's stated reason for the suspension, and thus fails to satisfy her burden to show pretext.

Finally, Allstate states that it terminated Hetreed after conducting its internal investigation into the breach, hearing her testimony at the March 7, 1997 preliminary injunction hearing, and because of additional documents she produced at the hearing. Hetreed testified that in requesting the fee information, she was "doing the company a service by

making sure they were using competent counsel." She also produced a copy of the 1995 version of something called the "3000 ledger," a general ledger of fees paid by Allstate, which Allstate says she should not have taken off company premises. According to Allstate, it fired her for abusing her privileged position to access and disclose confidential information, and for lying about it under oath and during an internal investigation. Hetreed argues that Allstate was wrong to terminate her because her actions actually were reasonable and justified. Unfortunately for Hetreed, her disagreement with Allstate's business judgment about what constitutes unethical behavior on the part of its auditors is not the issue. *See Hetreed v. Allstate Ins. Co.*, 135 F.3d 1155 (7th Cir. 1998). Hetreed has presented no evidence that Allstate's reasons to terminate her were pretextual, or that the company has or would have excused similar lapses by an employee who had not filed suit against the firm. *See id.* at 1157-58. As such, she has not satisfied her burden.

Accordingly, I grant Allstate's motion for summary judgment on count II in part and deny it in part.

Count III: ADA Failure to Accommodate

Hetreed contends that Allstate discriminated against her in violation of the Americans with Disabilities Act ("ADA") for failing to reasonably accommodate her disability. Title I of the ADA proscribes discrimination against a "qualified individual with a disability" because of said disability "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. *See* 42 U.S.C. § 12112(a) (1994). To overcome

Allstate's motion for summary judgment, Hetreed must show that there is a genuine issue of material fact with respect to whether she is disabled, whether she is a qualified individual, and whether Allstate knew about the disability and failed to reasonably accommodate her. *See Baert v. Euclid Beverage Ltd.*, 149 F.3d 626, 629 (7th Cir. 1998); *Baulos v. Roadway Express, Inc.*, 139 F.3d 1147, 1151 (7th Cir. 1998).

Allstate's first argument is that Hetreed is not disabled under the ADA, which defines "disability" as (a) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment. 42 U.S.C. § 12102(2). Hetreed asserts that she is disabled under subsection (a) because she suffers from medically diagnosed post-traumatic stress disorder (PTSD) and major depression,[4] which substantially limit her ability to work.

While Hetreed's recent medical diagnoses are enough to show that she suffers from a mental impairment for ADA purposes, they are not enough alone to establish a substantial limitation on her ability to work. *See Hoeller v. Eaton Corp.*, 149 F.3d 621, 625 (7th Cir. 1998) (diagnosed bipolar affective disorder not disability under ADA because no substantial limitation on employment generally); *Patterson v. Chicago Assoc. for Retarded Citizens*, 150 F.3d 719, 725-26 (7th Cir. 1996) (diagnosed paranoia not disability

4. Plaintiff also asserts, based on her own testimony, that she has been diagnosed with irritable bowel syndrome. That testimony alone is insufficient to establish that she suffers from a physical impairment under the ADA. Further, she fails even to argue how that condition, even if proved, would affect her ability to work.

under ADA because no substantial limitation on employment generally). Rather, being substantially limited in the major life activity of working requires that a person be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i); *Patterson*, 150 F.3d at 725. An inability to perform a particular job for a particular employer is not sufficient; rather, the impairment must substantially limit employment generally. *See id.*

Allstate points to Hetreed's own testimony that her impairments imposed only moderate limitations on her daily activities and imposed no appreciable limitations on her ability to work as an auditor and argues that she is not substantially limited in her work. That argument misses the mark, however, for Hetreed's testimony with regard to her ability to work was based on her ability while medicated, and she expressly said she did not know what would happen if she was taken off the medication. This distinction is important, because the Seventh Circuit has instructed that in assessing the impact of an individual's impairments on his or her major life activities, I am to examine the extent of the impairment without regard to the availability of mitigating measures such as medicines. *See Baert*, 149 F.3d at 629.

It is Hetreed's burden to come forward with facts sufficient to show that she could meet her ultimate burden of showing an ADA-recognized disability, *see DePaoli v. Abbott Lab.*, 140 F.3d 668, 671 (7th Cir. 1998), which in this case means showing that without her medication, her mental conditions substantially limit her ability to work either

at Allstate or as an auditor generally. *See Patterson*, 150 F.3d at 725-26 (plaintiff's complete inability to work at her present teaching job due to her mental illness did not substantially limit her ability to work generally, because she could teach non-special educational students at a different school). The problem is that Hetreed has presented no evidence on this point. Neither of Hetreed's treating doctors, Drs. Lammers and Kepler, expressed an opinion as to the effect Hetreed's illness, if left untreated, would have on her ability to work.[5] Dr. Conroe, who is defendant's expert, confirmed the diagnosis of major depression and discussed general symptoms of the illness, which can include a difficulty to focus on work or daily activities and the impairment of a person's judgment and ability to make decisions, but did not discuss Hetreed's ability to work. Hetreed herself testified that there are no work-related auditing activities that she could not do as a result of her illnesses and that she simply did not know what would happen were she to stop taking the medication.

While I recognize that it is difficult for Hetreed to prove what effect her untreated illness would have on her ability to work, it is possible to do so either by showing her symptoms before she went on medication (or between

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5. In fact, Dr. Kepler said nothing about the effect of Hetreed's illnesses on her capacity to work. Dr. Lammers testified that Hetreed was not incapacitated, assuming a definition of incapacity as "an inability to work." While he did answer "yes" to a question on Hetreed's FMLA form inquiring whether she would need intermittent time off due to her illness, when asked in January 1997 to clarify any accommodations she required, he recommended only that her exposure to her supervisor be limited.

regimens) or through medical testimony, and that is what the ADA requires. Hetreed simply has not done this. I find that she is not disabled under the ADA, and therefore is not entitled to its protections.[6]

Accordingly, I grant Allstate's motion for summary judgment on count III.

Conclusion

For the foregoing reasons, I grant summary judgment for Allstate on counts I and III in their entirety and on count II in part.

ENTERED:

s/ [copy]
James B. Zagel
United States District Judge

DATE: 5/11/99

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6. I note, in the alternative, that even if Hetreed is disabled under the ADA, she has not established a genuine issue of material fact as to Allstate's failure to reasonably accommodate her needs. She did not work on the control self-assessment project, she did not have to work more than five days a week or evenings and Bahrman reassigned work she was unable to do to help make sure that that happened. Allstate engaged in a process to clarify her request to limit her exposure to her supervisor, which it reasonably decided could only be accommodated by moving her out of the department, *see Weiler v. Household Finance Corp.*, 101 F.3d 519, 526 (7th Cir. 1996), and it is Hetreed, rather than Allstate, who cut off that interactive process in her memorandum to Bahrman in February 1997.